IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1901.

THE KOKOMO FENCE MACHINE COMPANY, Petitioner,
vs.
ALVA L. KITSELMAN ET AL., Respondents.
No. 389.

MOTION FOR SUPERSEDEAS OR STAY OF PROCEEDINGS.

Now comes the Kokomo Fence Machine Company, the petitioner, by its counsel, and moves the court for a writ of supersedeas or order directed to the Circuit Court of the United States for the District of Indiana, or to the United States Circuit Court of Appeals for the Seventh Circuit, as may be appropriate, directing a stay of proceedings on the accounting for profits and damages before the master, on such terms as to bond, or otherwise, as may seem just and equitable, and as grounds for such motion shows:

1. That this court did on, to wit, the twenty-eighth day of October, 1901, grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit ordering said court to certify up the record in the above-entitled cause for hearing in this court, which has been done.

2. That prior to the issuance of such writ of certiorari the United States Circuit Court of Appeals for the Seventh Circuit issued its mandate to the Circuit Court of the United States for the District of Indiana directing such court to enter a decree and to proceed in accordance with such mandate in the usual terms and provisions in such cases.

3. That in obedience to such mandate, and prior to the issuance of such writ of certiorari by this court, said Circuit Court did enter a decree, and among other things refer said cause to a master in chancery directing him to take an account of profits and damages, as usual in such cases.

4. That in accordance with such reference the master, at the instance of the respondents, has been, both before and after the issuance of such writ of certiorari, proceeding with the accounting as to profits and damages, notwithstanding the transference of said cause to this court by said writ of certiorari.

5. That after the issuance of said writ of certiorari and on, to wit, the fourth day of November, 1901, the petitioner, the Kokomo Fence Machine Company, moved the Circuit Court of the United States for an order staying the proceedings on the accounting before the master, but that such court denied said motion, though suspending such proceedings before the master for thirty days in order that a motion could be made in the Circuit Court of Appeals issuing the mandate for its action thereon.

6. That thereupon and on, to wit, the fifteenth day of November, 1901, said motion for a stay of proceedings be-

fore the master "or for an order directing the Circuit Court to make such order in the premises as justice and equity may require" was made in the said Circuit Court of Appeals, but said Circuit Court of Appeals did order that said motion be overruled and denied on the ground that said court "has now no jurisdiction of said cause."

7. That afterwards and on, to wit, the fifth day of December, 1901, said motion for a stay of proceedings was renewed in the United States Circuit Court, but said court declined again to grant the same in view of the terms of the mandate ordering and directing said court to proceed in said cause.

8. That the petitioner, the Kokomo Fence Machine Company, has requested the respondents to consent to a stay of proceedings, but that they decline and refuse so to do, and persist in said accounting proceedings before the master.

9. That the petitioner, the Kokomo Fence Machine Company, is being put to trouble, annoyance and expense by reason of such proceedings before the master, that it has on several occasions exhibited its books before the master and furnished a report in writing showing the number of fence machines made and sold by it and the cost of such machines and the price at which sold, and produced one of its chief executive officers for examination, that it is not manufacturing, selling or using any fence machine held to be infringements by the said Circuit Court of Appeals and has not for more than a year last past, that it is submitting and is ready and willing to submit to the injunction issued against it out of said Circuit Court in obedience to said

mandate, but it respectfully submits that it ought not to be harassed and put to the annoyance, trouble and expense of proceeding for an accounting as to profits and damages before the master until the determination of said cause in this court, inasmuch as said proceedings must prove useless and any decree entered in pursuance thereof set aside and rendered nugatory if this court shall hold and decide that the decision of the said Circuit Court of Appeals to which the writ of certiorari was issued was and is erroneous and must be reversed and set aside.

10. That inasmuch as the petitioner, the Kokomo Fence Machine Company, has been unable to obtain relief in said Circuit Court and in said Circuit Court of Appeals, and is without remedy except in this court, this motion is respectfully sumbitted, and such writ or order, directed to said Circuit Court or said Circuit Court of Appeals as may seem meet, is respectfully asked to the end that proceedings on the accounting before the master may be stayed pending the determination of said cause in this court.

KOKOMO FENCE MACHINE CO.,
By JOHN E. FREDRICK,
Secretary.

THOMAS A. BANNING,
EPHRAIM BANNING,
Counsel for the Kokomo Fence Machine Company.

C. C. SHIRLEY,
Of Counsel.

State of Indiana, Marion County, ss.

John E. Fredrick, being duly sworn, on oath deposes and says that he is secretary of the Kokomo Fence Machine Company; that he has read the foregoing motion signed by said company; that he knows the contents thereof, and that the facts set forth in said motion are true of his own knowledge.

JOHN E. FREDRICK.

Subscribed and sworn to before me this 24th day of December, 1901.

CONRAD WOLF,
Notary Public.

[SEAL.]

My com. expires Nov. 18, 1903.